SEK ANN THONG

v.

TAMPARULI GRANITE QUARRY (SABAH) SDN. BHD. & ANOR.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN TEE AH SING JC
[SUIT NO. K. 1478 OF 1985]
6 JULY 1995

PRACTICE & PROCEDURE: *Pleadings - Amendments to statement of claim - Hearing of application not fixed for 8 years - Amendments sought on trial date - Whether application made bona fide - Order 20 r. 5 Rules of the High Court 1980.*

PRACTICE & PROCEDURE: *Pleadings - Amendment to statement of claim - Whether proposed amendments seek to convert claim into an inconsistent claim of a different nature - Whether plaintiff introducing an entirely new cause of action - Limitation - Order 20 r. 5 Rules of the High Court 1980.*

The writ and statement of claim were filed on 26 November 1985. The defence of the 1st and 2nd defendants was filed on 7 January 1986. On 22 December 1987, the plaintiff filed a summons in chambers under O. 20 r. 5 of the Rules of the High Court 1980 (RHC) to amend the statement of claim, supported by the affidavit of Noel Kenneth Davidson affirmed on 16 October 1986. No hearing date for the said summons had been fixed by the Court but notice of the plaintiff's application was given to the defendants on 26 June 1995 and the plaintiff sought the amendments on the day fixed for the trial of the case. The defendants objected to the proposed amendments on the following grounds:

(i) the amendments sought were too late being 10 years after the filing of the writ and there was substantial delay prejudicing the defendants;

(ii) that the plaintiff made a tactical manoeuvre by filing a generally indorsed writ and on the same day obtaining an order *ex parte* for the production of the account books and appointment of receivers to use the information and particulars to pursue a claim which the plaintiff previously did not possess;

(iii) particulars of the claim in the proposed amendments convert the character of the cause of action into another type of claim of an inconsistent nature;

(iv) proposed amendments in paragraph 9(b) of the statement of claim seek to convert the alleged secret profit of RM15,000 allegedly taken by the 2nd defendant from Paramount Industries Sdn. Bhd. over the sale of granite into an alternative claim for recovery of a secret commission over the same brokerage done by the 2nd defendant in his personal capacity on the resale of the shophouse in Inanam;

(v) that paragraph 11 of the proposed amendment pleads a new cause of action not originally pleaded namely; payment of royalty and rental over the quarry which is statute barred; and

(vi) the proposed claim for specific performance would in effect turn the suit from one character into a suit of another inconsistent character.

Held:

[1] Although the plaintiff had not explained why the said application remained unattended for 8 years, the Court was partly at fault for not fixing a return date. The statement of

claim showed that all allegations in the proposed amendments were within the control and knowledge of the defendants. Therefore, the delay did not prejudice the defendants nor take them by surprise. However late the amendment is sought, it should be allowed if it will not injure the opponent or prejudice him in some way that cannot be compensated by costs.

[2] The application was not a tactical move as it is averred in paragraph 3 of the original statement of claim that the defendants had at all material times control and management of all books of accounts, management accounts, working papers, bank statements, cheque stubs, contracts, delivery orders and invoices of the 1st defendant and the plaintiff did not have any control over the same.

[3] The particulars of the claim do not change the character of the cause of action to another type of claim of an inconsistent nature and the new particulars relate back to a cause of action which existed and was pleaded. Therefore, the proposed amendment does not prejudice the defendants and the application is made *bona fide*.

[4] The defendants' argument over paragraph 9(b) is accepted and to allow the amendment would turn the suit from one character into that of another inconsistent character which will prejudice the defendants. As such, the proposed amendment to paragraph 9(b) is disallowed.

[5] The proposed amendment in paragraph 11 would introduce an entirely new cause of action in that it could not be said that it had arisen out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed. It cannot be inferred that the statement of claim includes this new cause of action. The plaintiff had failed to bring it within the scope of O. 20 r. 5 of the RHC.

[6] The existing statement of claim is largely a claim for accounts and for an order to pay up funds not accounted for in the books of the company. The proposed claim for specific performance is in the nature of a company law relief under s. 162 Companies Act. This amendment is disallowed as it would turn the character of the suit into another of inconsistent character.

[Amendments partially allowed].

Cases referred to:
Dr. S. Underwood v. Ong Ah Long [1986] 2 MLJ 246 ***(refd)***
Hock Hua Bank Bhd. v. Leong Yew Chin [1987] 1 MLJ 230 ***(foll)***
Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1983] 1 MLJ 213 ***(foll)***
Ismail bin Ibrahim v Sun Poh Development Sdn. Bhd. [1988] 3 MLJ 348 ***(refd)***
Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1983] 1 MLJ 213 ***(refd)***
Simetech (M) Sdn. Bhd. v. Yeoh Cheng Liam Construction Sdn. Bhd. [1992] 1 MLJ 11 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 162
Rules of the High Court 1980, O. 20 r. 5

Other source referred to:
Supreme Court Practice 1991, p. 368 para. 20/5 - 8/9
White Book 1985, p. 343, para. 20/5 - 8/11

For the plaintiff - Raymond Szetu; M/s. JNLS Assoc.
For the defendants - Cyrus Das (Vincent Fernandez with him); M/s. Fernandez & Co.

JUDGMENT

Tee Ah Sing JC:

In this case the writ of summons and statement of claim were filed on 26 November 1985

The statement of defence of the 1st defendant was filed on 7 January 1986. The statement of defence of the 2nd defendant was also filed on 7 January 1986.

On 22 December 1987 the plaintiff filed summons in chambers under O. 20 r. 5 of the Rules of the High Court 1980 ('the RHC") to amend the statement of claim. The proposed amendments are underlined. The summons-in-chambers is supported by an affidavit of Mr. Noel Kenneth Davidson affirmed on 16 October 1986.

The learned Counsel for the plaintiff informed the Court that notice of the application for amendment was given to the defendants on 26 June 1995. This application was in fact filed on 22 December 1987 and no date has been fixed by the Court.

I have perused the Court file and I note that the summons in chambers for the proposed amendments was filed on 22 December 1987.

However no return date was given to this summons in chambers by the Court registry. On the other hand the previous solicitors for the plaintiff did not inform the Court about the summons in chambers and that it has not been fixed for hearing. As pointed out by the present solicitors for the plaintiff he came to know of this summons in chambers only on 26 June 1995. And he informed the solicitors for the defendants about it.

So on 5 July 1995, on the day fixed for the trial of this case the Court heard submissions in respect of this summons in chambers for an application to amend the statement of claim.

I shall first deal with the submission of the learned Counsel for the defendants that the proposed amendments are sought to be made on the date of the trial itself and comes almost 10 years after the filing of the writ.

The application was filed on 22 December 1987. No explanation was given why this application remained unattended for almost 8 years. He submitted that there was substantial delay which is prejudicial to the defendants. The exercise of discretion by the Court in considering amendments at the date of trial is always most stringent than an application made before the trial itself. In support he cited the White Book 1985 at page 343 paragraph 20/5 - 8/11 which reads:

> But the Court will not readily allow at the trial an amendment the necessity for which was abundantly apparent months ago, and then not asked for (*Hipgrave v. Case* [1885] 28 CLD 356 p. 361); nor will an amendment be allowed at the hearing which for the first time introduces a charge of fraud.....

He also cited the case of *Dr. S. Underwood v. Ong Ah Long* [1986] 2 MLJ 246 at page 251.

> Their Lordships are in no doubt that the amendment proposed on behalf of Dr. Underwood on the first day of the trial was altogether lacking in specification and utterly inappropriate in form to give fair notice of the evidence which it was proposed to lead on his behalf and, coming as it did fourteen years after the accident, called for explanation why it had come so late.

The learned Counsel for the plaintiff submitted that the application can be made "at any stage of the proceedings" so long as the opposite party is not prejudiced in a way which cannot be compensated by cost. In support he cited the Supreme Court Practice 1991 page 368 paragraph 20/5 - 8/89 which reads as follows:

> Rules 5 and 8, expressly state that an amendment may be allowed "at any stage of the proceedings" (*Roe v. Davies* [1876] 2 Ch.D 729, 733) and amendments may be allowed before, or at, or after the trial, or even after judgment or on appeal (*The Duke of Buccleuch* [1892] P. 201; *G.L. Baker Ltd. v. Medway Building & Supplies Ltd.* [1958] 1 WLR 1216; [1958] 3 ALL ER 540, CA). As a general rule, however late the amendment is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise.

I have perused the affidavit of Noel Kenneth Davidson sworn on 16 October 1986. There is exhibited a copy of a report on statement of claim (exhibit "El"). I find that the allegations in the proposed amendments are based on the facts as stated in exhibit El.

In this case although the plaintiff has not explained why the said application remained unattended for 8 years I am of the view that the Court was partly at fault for not fixing a return date. Due to inadvertence this application was not fixed for hearing. I find that the application was made *bona fide.*

In paragraph 3 of the original statement of claim it is averred as follows:

> 3. (a) The 2nd defendant is and has at all material times been a director and shareholder of the 1st defendant company. The 2nd defendant is and has been the secretary of the 1st defendant company and is and has been in full control of the management and affairs of the 1st defendant company.
>
> (b) The 1st and 2nd defendants are and have at all material times been in control and management of all books of account, managements, accounts, working papers, bank statements, cheque stubs, contracts, delivery orders, working papers, bank statements and invoices of the 1st defendant company.

It is clear from paragraph 3 of the statement of claim that all the allegations as stated in the proposed amendments are within the control and knowledge of the 1st and 2nd defendants. Therefore I am of the view that the delay in the hearing of this application to amend the statement of claim would not prejudice the defendants nor take the defendants by surprise.

The defendants can be compensated by costs.

In *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 MLJ 230 His Lordship Abdul Hamid Ag. LP (as he then was) at page 230 said:

> The respondents had caused a writ accompanied by a statement of claim to be issued against the appellants on 8 October 1980. The matter relates to a claim in 1974. On 3 December 1984, the respondents took out O. 25 summons for directions seeking *inter alia*, an amendment of the statement of claim to introduce a new cause of action....

It is clear from the case cited that the application for amendment was allowed ten years from the claim in 1974. By analogy I am of the view that the Court can hear this application to amend the statement of claim even on the 1st day of the trial after 10 years.

Further the passage at paragraph 20/5 - 8/9 of the *Supreme Court Practice 1991* at page 368 supports the view "that an amendment may be allowed before, or at, or after the trial. ... As a general rule, however late the amendment is sought to be made, it should

be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise".

I shall next deal with the submission of the learned Counsel for the defendants that to use the report and information supplied by the receiver appointed *ex parte* to boost up the statement of claim and to re cast some parts of it is not *bona fide*.

I reject this contention for whether amendments are allowed or refused the general principles are set out in the case of *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213.

The learned Counsel for the defendants also contended the plaintiff made a tactical manoeurve citing the case of *Ismail bin Ibrahim v. Sun Poh Development Sdn. Bhd.* [1988] 3 MLJ 348 by filing a writ and statement of claim with general allegations and on the same day of filing the writ obtaining *ex parte* an order for production of account books and appointment of receivers so that the account books and the report of the receivers would provide him with the requisite information and particulars to pursue the claim which he previously did not possess.

I agree with the contention of the learned Counsel for the plaintiff that the application was not a tactical move as it is clearly averred in paragraph 3 of the original statement of claim that the 1st and 2nd defendants are and had at all material times been in control and management of all the books of accounts, management accounts, working papers, bank statements, cheque stubs, contracts, delivery orders and invoice of the 1st defendant company and that the plaintiff has no control of the books or accounts of the company. Therefore the issue whether to allow or disallow the proposed amendments must be guided by the principles enunciated in the *Yamaha* case.

The principles whether an application for amendment of pleading should be allowed or not are set out in *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.* [1983] 1 MLJ 213 His Lordship Mohamed Azmi FJ (as he then was) at page 214 said:

> Under O. 20 of the Rules of the High Court 1980, which is equivalent to O. 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (See *Kam Hoy Trading v. Kam Fatt Ting Mine* [1963] MLJ 248). The general principle is that the Court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

I shall now proceed to consider the proposed amendments. The proposed amendments for paragraph 8 of the statement of claim which are underlined are as follows:

> 8. (a) The plaintiff has further in the month of October 1985 discovered that on diverse dates the 2nd defendant, whilst in charge of the business of the 1st defendant, had sold large quantities of granite produced by the 1st defendant company to Paramount Industries Sdn. Bhd. **and to other third party purchasers** under sales invoice printed with the name Tamparuli Granite Quarry Sdn. Bhd. (a non-existent company not registered with any authorities) for which the 1st defendant company never received any payment nor were such cash transactions credited **or accounted** for in the 1st defendant company's accounts **for the total sum of RM593,306**. The 2nd defendant had in breach of his fiduciary duty and the joint venture arrangement retained and converted to his own use the monies paid by the said Paramount Industries Sdn. Bhd. **and other cash sales** for the said granite belonging to the 1st defendant sold and delivered to the said Paramount Industries Sdn. Bhd. and

other third party purchasers under the sales invoices of Tamparuli Granite Quarry Sdn. Bhd.

Particulars

(i) Particulars for the cash sales of RM593,306 for the periods 1982, 1983, 1984 and 1985:

Summary of Cash Sales Proceeds of the Company - 1 June 1982 to 26 November 1985.

			(RM)	
	1982	June	15,798.00	
		July	7,760.00	
		August	4,705.00	
		September	6,320.00	
		October	10,435.00	
		November	27,841.00	
		December	49,627.00	
	1983	January	48,630.00	
		February	10,948.00	
		March	19,596.00	
		April	14,648.00	
		May	21,323.90	
		Year Ended 31 May 1983		237,631.90
		Bal. b/d		237,631.90
		June	13,858.90	
		July	11,851.60	
		August	9,581.30	
		September	13,802.30	
		October	12,128.50	
		November	8,040.92	
		December	10,050.67	
	1984	January	18,858.13	
		February	8,610.95	
		March	10,631.64	
		April	6,595.00	
		May	3,335.00	
		Year Ended 31 May 1984		127,344.91
		June	3,180.20	
		July	4,934.90	
		August	6,677.94	
		September	5,039.00	
		October	1,747.00	
		November	2,994.00	
		December	4,651.00	
	1985	January	2,614.68	
		February	4,419.08	
		March	43,578.25	

April	24,497.51	
May	34,054.24	
Year Ended 31 May 1985		138,387.80
		503,364.61
June		5,578.23
July		19,273.57
August		35,871.12
September		10,673.32
October		6,760.74
November		
(up to 26 November 1985)		11,784.41
Grand total		593,306.00
		========

(ii) 9 payments form Paramount Industries Sdn. Bhd. untraceable in the 1st defendant's accounts:

Voucher	Payment		Cheque No.	Amount (RM)
UCQ24/3	14 March 1985	UMBC KK	022319	3,000.00
UCQ30/3	18 March 1985		022325	965.48
UCQ49/5	22 May 1985		035807	4,000.00
UCQ8/6	11 June 1985		035830	7,337.60
UCQ34/7	18 July 1985		046818	6,000.00
UCQ33/7	18 July 1985		046817	7,400.00
UCQ27/8	25 August 1985		052665	13,400.00
UCQ15/8	5 September 1985		052653	20,420.00
				65,523.08
				========

In respect of these proposed amendments the learned Counsel for the plaintiff submitted that the proposed figure in the amendment totalling RM593,306 was only discovered after the receivers appointed by the Court investigated the accounts. The proposed amendment specifically stated full particulars in regard to RM593,306 received by the 2nd defendant from Paramount Industries Sdn. Bhd. and other third parties which the 2nd defendant converted for his own use.

The new particulars relate back to a cause of action which existed and was pleaded In the original statement of claim i.e. conversion of receipts from cash sales and breach of fiduciary duty. The proposed amendment does not add a new cause of action.

In support he cites the case of *Simetech (M) Sdn. Bhd. v. Yeoh Cheng Liam Construction Sdn. Bhd.* [1992] 1 MLJ 11.

On the other hand the learned Counsel for the defendants submitted that previously the claim was based entirely on cash sales to a company Paramount Industries Sdn. Bhd. and now the plaintiff is seeking to convert this claim to include also "other third party purchasers" and also "other cash sales". The character of this cause of action is being converted to another type of claim of an inconsistent nature.

I am of the view that it is pleaded in the original paragraph 8 of the statement of claim of the breach of fiduciary duty by the 2nd defendant and the conversion of monies received from cash sales. Therefore the proposed amendments to include "and other third party purchasers" and "other cash sales" do not change the character of the cause of action to another type of claim of an inconsistent nature. Further the new particulars relate back to a cause of action which existed and was pleaded. (See *Simetech (M) Sdn. Bhd. v. Yeoh Cheng Liam Construction Sdn. Bhd.* [1992] 1 MLJ 11). I also find that the proposed amendments do not prejudice the defendants. I find that the application is made *bona fide*. I allow the proposed amendments in paragraph 8 of the statement of claim. I shall now deal with the proposed amendments in paragraph 9(b) of the statement of claim.

> (b) Further or in the alternative, if the RM15,000 received by the 2nd defendant from the said Paramount Industries Sdn. Bhd. is a commission which the 2nd defendant purportedly earned in his capacity as a broker for the resale of one unit of shophouse in Inanam, Kota Kinabalu, to Paramount Industries Sdn. Bhd. the said shophouse in question was one or two which was built by the 1st defendant and as such the commission was received by the 2nd defendant whilst a director of the 1st defendant and arising from the sale of the property through which the 1st defendant was interested in at the material time and since the 1st defendant never approved nor authorized such receipt by the 2nd defendant, it constituted a breach of the 2nd defendant's fiduciary duty to the 1st defendant.

The learned Counsel for the plaintiff submitted that the proposed amendments in paragraph 9(b) plead lack of authority of the 2nd defendant to receive a commission of RM15,000 and a breach of fiduciary duty which was the cause of action which accrued to the plaintiff at the time of issuance of the writ and it relies on the same particulars pleaded in the original paragraph 9. The learned Counsel for the defendants contended that the proposed amendments in paragraph 9(b) of the statement of claim seek to convert the alleged secret profits of RM15,000 allegedly taken by the 2nd defendant from Paramount Industries Sdn. Bhd. over the sale of granite into an alternative claim for recovery of a secret commission over some brokerage done by the 2nd defendant in his personal capacity on the resale of a shophouse in Inanam.

I agree with the contention of the learned Counsel for the defendants that the proposed amendments seek to convert the claim into an inconsistent claim of a different nature.

In my view to allow the amendment would in effect turn this suit which is of one character into that of another and inconsistent character. This will prejudice the defendants. As such I disallow the proposed amendments to paragraph 9(b).

The proposed amendments underlined in paragraph 11 of the statement of claim are as follows:

> 11. The 1st defendant had purchased the granite quarry from one Buja Bin Gumbilai and according to the 1st defendant's company's accounting records and audited accounts, it had purportedly paid rental and royalty to Buja Bin Gumbilai the previous owner of the quarry and also to the 2nd defendant particulars whereof are as follows:

Particulars

Year ended	31 May 1981	23,000.00	(Rental)
	31 May 1982	59,204.30	
	31 May 1983	149,858.23	
	31 May 1984	290,742.28	
	31 May 1985	51,686.96	

> The 2nd defendant through the 1st defendant had thereby improperly caused the 1st defendant or authorized such payment of purported rental and royalty and consequently causing the 1st defendant to suffer loss by such payment to the detriment of the 1st defendant and/or plaintiff and which was further a breach of the joint venture arrangement in the unauthorized depletion of funds to the detriment of the plaintiff.

The learned Counsel for the plaintiff submitted that the proposed amendments in paragraph 11 of the statement of claim plead a new cause of action which was not originally pleaded. And this new cause of action is not statute barred at the time of the application. And the facts that support this new cause of action only came to light after the managers and receivers reported their findings on the accounts of the 1st defendant company.

It was a cause of action which the plaintiff was entitled to plead on the date of issuance of the writ since it accrued before the commencement of action.

The learned Counsel for the defendants submitted that the proposed amendments in paragraph 11 raises a new cause of action namely the payment of royalty and rental over the quarry. The last of the rental payments was allegedly made on 31 May 1985 and therefore the cause of action is today clearly statute barred. In support the case of *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 MLJ 230 is cited.

It is plain that the proposed amendment in paragraph 11 would introduce an entirely new cause of action in that it could not be said that it had arisen out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the plaintiff.

I am not unmindful of the fact that these facts to support the new cause of action only came to light after the findings of the receiver appointed *ex parte* by the Court on 26 November 1985.

In my opinion it cannot be inferred that the statement of claim includes this new cause of action. I am therefore of the view that the plaintiff has failed to bring the proposed amendments in paragraph 11 within the scope O. 20 r. 5 of the RHC. (See case of *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] 1 MLJ 230 at page 232 where His Lordship Abdul Hamid Ag. LP (as he then was) said:

> It is also clear from the established principle that the Court has power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action subject to one very important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

In prayer (iv) the amendment sought is "Tamparuli Granite Quarry (Sabah) Sdn. Bhd".

I allow the proposed amendments as this will not cause prejudice or injustice to the defendants. In prayer (v) the proposed amendments are "the sum of RM593,306 or and "at the rate of 8% per annum from the time the 2nd defendant received each sum until full and final settlement."

Since I have allowed the proposed amendments in paragraph 8 of the statement of claim, the consequential amendments in this prayer (v) are also allowed.

In prayer (vi) the proposed amendments are "or alternatively the purchase of the shophouse by" to reflect the proposed amendment in paragraph 9(b).

Since I have disallowed the proposed amendments for paragraph 9(b) I therefore disallow this proposed amendment.

And for prayer (viii) the proposed amendments as underlined are as follows:

> (viii) for an order for specific performance of the joint venture agreement that either, the shares purportedly allotted to the plaintiff and 2nd defendant on 15 May 1985 be ordered to be cancelled or that the 2nd defendant be ordered to transfer 100,000 of his shares in the 1st defendant to the plaintiff and they are to pay for the allotment.

In respect of the proposed amendments the learned Counsel for the plaintiff submitted that these arise out of the matters pleaded in paragraph 5 of the statement of claim. On the other hand the learned Counsel for the defendants submitted that this is a new cause of action. It converts the character of this suit into a different and inconsistent type within the Yamaha principle.

The existing statement of claim is largely a claim for accounts and for an order to pay up funds not accounted for in the books of the company. The proposed claim for specific performance is in the nature of a company law relief under s. 162 of the Companies Act. It calls for a cancellation of the new allotment of shares and for a retransfer of shares.

I agree that the proposed amendments would in effect turn the suit from one character into a suit of another and inconsistent character. As such, the proposed amendments are disallowed.

The costs for this application shall be paid by the plaintiff. The defendants shall be given liberty to amend their statement of defence within two weeks of the receipt of the amended statement of claim. The costs of the amended statement of defence shall be borne by the plaintiff.